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March 17, 2015

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### **By ECF**

Hon. Gary R. Brown, U.S.M.J.  
United States District Court for the Eastern District of New York  
100 Federal Plaza  
P.O Box 9014  
Central Islip, NY 11722-9014

**Re: *Cablevision Sys. Corp. v. Verizon Commc'ns, Inc., 15-cv-456-LDW-GRB:*  
Cablevision's Response to Verizon Motion To Compel Discovery**

Dear Judge Brown:

We represent Plaintiffs/Counterclaim Defendants in the above action (“Cablevision”), and write in response to the March 10, 2015 letter motion filed by Defendants/Counterclaim-Plaintiffs (“Verizon”) [D.I. 38]. Verizon asks Your Honor to compel production by Cablevision in response to a highly burdensome request that, for reasons detailed below, is not directed to subjects actually in dispute in this action.

### **The Underlying Litigation**

As set out in Cablevision’s own recent motion [D.I. 41], Verizon’s claims against Cablevision should be viewed in the context in which they were made. Cablevision initiated the present action shortly after Verizon began a national advertising campaign in which Verizon claimed to offer the “fastest WiFi available from any provider.” Cablevision recognized that this statement could not be true, given in part the WiFi routers offered by both companies, and that the nonpublic “router study” Verizon cited in these advertisements could not support Verizon’s claim. Indeed, once Cablevision brought this action and Verizon had to turn over this “router study” in discovery, Verizon quickly began to remove references to the study from its advertisements. However, Verizon persists in making its false “fastest WiFi” claim.

At the same time that Verizon worked to erase the “router study” from its ads, Verizon for the first time alleged false and misleading advertising by Cablevision across an array of Cablevision ads, in its February 12, 2015 Answer and Counterclaims [D.I. 27] (“Counterclaims”). The particular claim that underlies Verizon’s motion to compel is an advertisement Cablevision published correctly noting that the *Wall Street Journal* (*WSJ*) found that Cablevision offered “faster-than-promised download speeds.”<sup>1</sup>

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<sup>1</sup> See “Is Your Internet Connection Slower Than Advertised?” Wall Street Journal, April 21, 2014, available at <http://blogs.wsj.com/digits/2014/04/21/is-your-Internet-connection-slower-than-advertised>.

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### The Requested Discovery

Verizon's letter misdescribes both the actual advertising claim made by Cablevision and Verizon's Counterclaim concerning the ad. Verizon's letter portrays the claim in question as follows:

In one of these deceptive advertisements, Cablevision asks, "How many [Internet providers] did the Wall Street Journal find to have faster-than-promised download speeds?" The ad answers at the end, "Just one. Optimum Online." This is false. Verizon also provides faster-than-promised download speeds.

[D.I. 38, at 1.] Verizon's recitation is entirely misleading. A storyboard for the full ad in which this claim appears is attached as Exhibit 1 to Verizon's Counterclaims and is also appended to this letter. As shown, the ad asks a series of questions, and after each question, "pushpins" on a map fall off, leaving only one pushpin after all of the questions have been asked. Cablevision does not advertise, as Verizon suggests, that Cablevision was the only provider that the *WSJ* found to have faster-than-promised download speeds. Indeed, multiple pushpins remain on the map following that question.

But even if Verizon's flawed interpretation of the ad were true, that still does not justify Verizon's request for "All documents relating to Cablevision's claim that Cablevision provides 'faster-than-promised' download speeds, including but not limited to any communication, reports, tests, summaries, and/or data related to download and upload percentage of advertised speed ..." (Verizon Request for Production, No. 9.)

Verizon's Counterclaim challenges this claim as false on the sole basis that the *WSJ* article cited by Cablevision "clearly shows that Verizon's FiOS service also provides 'faster-than-promised' download speeds," and that "Reasonable consumers can interpret Cablevision's ad to mean that Verizon FiOS does not." (Counterclaims, ¶ 63.) Having explicitly set out a single basis for the alleged falsity of this claim, Verizon should not be entitled to burden Cablevision with a broad request for "[a]ll documents" concerning a wholly different theory.

Finally, to the extent that Verizon seeks to undermine the reliability of findings in the *WSJ* article, Verizon cannot have it both ways. On the one hand, Verizon asserts that Cablevision's claim is false (based on Verizon's skewed interpretation) because the *WSJ* also found that Verizon offered faster-than-promised download speeds. Yet on the other, Verizon claims that it is entitled to broad discovery into this claim because Cablevision is not entitled to rely on the *WSJ* in isolation. In support of the latter theory, Verizon suggests that the *WSJ* finding is a mere "testimonial" or "endorsement." That is not so. The *WSJ* findings are based on "data provided by [the internet speed-testing service] Ookla" which "compiled these data from tens of millions of speed tests as well as surveys of 646,404 Speedtest users' subscribed Internet speeds over the past 12 months," and "previously licensed its data and technology to the Federal

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Communications Commission.”<sup>2</sup> As such, the *WSJ* finding is not a mere endorsement, such as by a consumer or celebrity, but rather a journalistic conclusion corroborated by data.<sup>3</sup>

Even if Verizon were correct that the *WSJ* finding is an “endorsement” and that to rely on it Cablevision must “possess and rely upon adequate substantiation, including, when appropriate, competent and reliable scientific evidence” [D.I. 38, at 3] – then this standard is plainly met not only by the scientific data discussed in the article, but also by the most recent findings and data on this topic published by the FCC. In its 2014 “Measuring Broadband America” report,<sup>4</sup> the FCC found that Cablevision offered a sustained actual download speed at 119% of the advertised speed. (2014 Report, at 46 (VZ-CSC001434).) The validated data from each provider used by the FCC to make these findings are publicly-available on the FCC webpage.<sup>5</sup> These data are more than sufficient substantiation for Cablevision’s reference to the *WSJ*.

In view of the *actual* language in the advertisement challenged by Verizon, the *actual* challenge to this claim by Verizon in its Counterclaim, and the wealth of data already available to Verizon, Verizon’s broad and burdensome request that Cablevision provide all documents concerning its download and upload speeds is nothing more than a fishing expedition for voluminous and highly-sensitive information.

\* \* \*

Cablevision respectfully requests that Your Honor deny Verizon’s motion to compel.

Respectfully submitted,

/s/ Saul B. Shapiro

Saul B. Shapiro

Enclosure

cc: Counsel of Record

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<sup>2</sup> *Id.*

<sup>3</sup> Verizon is off-base in its attempt to characterize Cablevision’s citation to the *WSJ* as a “false testimonial.” Verizon asserts that “New York recognizes false ‘testimonials’ as actionable,” citing *Teller v. Bill Hayes, Ltd.*, 630 N.Y.S.2d 769, 773 (N.Y. App. Div. 1995). *Teller* makes a passing reference to “false testimonials” in a long list of actionable items, and cites to *FTC v. Colgate Palmolive Co.*, 380 U.S. 374 (1965) for elaboration. *Colgate* explains that, “[i]t is generally accepted that it is a deceptive practice to state falsely that a product has received a testimonial from a respected source.” *Id.* at 381. Even if the *WSJ* finding was a “testimonial” – which it is not – is it not disputed that the *WSJ* in fact made this finding.

<sup>4</sup> <http://www.fcc.gov/reports/measuring-broadband-america-2014>. Verizon already has this report, having produced it and corresponding technical appendices and data tables, at VZ-CSC001388-1537.

<sup>5</sup> <http://www.fcc.gov/measuring-broadband-america/2014/validated-data-fixed-2014#validated>.

# Exhibit 1

## Optimum Online

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**Title:** Of All the Internet Providers  
**Length:** 30



Alt Date 12-30-2014

ID: 11123361

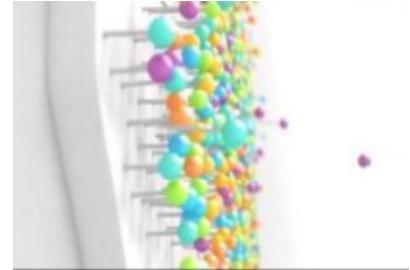
Market: New York



M-Ann: Of all the Internet providers in America, how many were



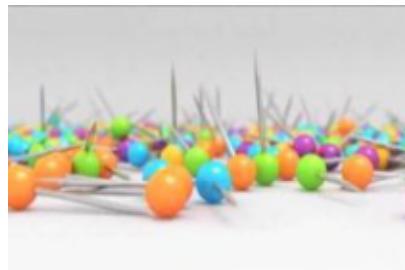
HD-verified by YouTube for the best quality streaming?



How many did the Wall Street Journal find to have



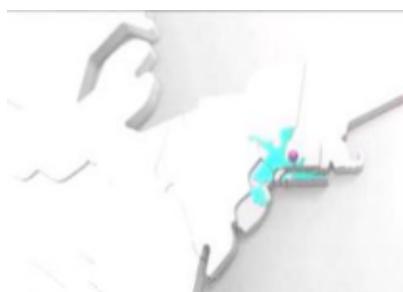
faster-than-promised download speeds?



And how many were ranked by Netflix as the best streaming experience



20 months in a row?



Just one.



Optimum Online. And it includes  
Optimum WiFi.



That's why the Tri-State area's choice for internet is  
Optimum Online.